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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 281

SARAH P. (COLBY) APPLEBY, *Petitioner*

v.

BENJAMIN COLBY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Sarah P. Appleby, petitioner, and appellant below, prays that a writ of certiorari issue to review the decree of the Court of Appeals of Maryland, entered on May 20, 1958.

OPINIONS BELOW

The decree of the Circuit Court for Montgomery County, Maryland, was entered on November 6, 1957, (R. 14). The Courts opinion per Judge Kathryn J. Lawler, is unreported but is included in the Record herein. (R. 10). The opinion of the Circuit Court of

Appeals of Maryland, filed May 20, 1958 (Appendix 1a), has not yet been reported.

JURISDICTION

The opinion of the Court of Appeals of Maryland, per Judge Horney, was filed May 20, 1958 (Appendix 1a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. ~~2101(c)~~ 1254 (1)

QUESTIONS PRESENTED

(1) Whether in a Maryland proceeding involving validity, under Article IV, Section 1, of the United States Constitution of a decree of divorce granted by the State of Nevada, a defendant (petitioner) who more than a year previous had abandoned residence and domicile in Maryland and never returned to that State (except several daytime visits (a) to attend a luncheon, (b) to get clothes and (c) to testify), despite such abandonment and actual residence elsewhere could be held as a matter of law to have thereafter continued as a domiciliary of Maryland.

(2) Whether the Maryland Court's determination that the decree of the Nevada Court was null and void was correct in the circumstances; or if that decree was entitled to full faith and credit in Maryland under Article IV, Section 1, of the Constitution of the United States?

(3) Whether respondent's acts in connection with the Nevada litigation precluded his right to ask the Circuit Court for Montgomery County, Maryland, to set aside the judgment of the Court of Nevada?

STATUTES INVOLVED

The United States Constitution, Article IV, Section 1, which provides:

> "Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article 35, Section 9, of the Maryland Code, which provides:

> "*Adverse Party May Be Called, Interrogated And Impeached.* In any suit or proceeding in equity in any Court of this State any party may call as a witness any adverse party * * * and interrogate him by leading questions and contradict him in every respect as if he had been called by the adverse party."

The parties below jointly prepared the following—

AGREED STATEMENT OF UNDISPUTED FACTS

Appellee, husband, Benjamin Colby, and appellant, wife, Sarah P. Colby, were married in Chicago, Illinois, on November 24, 1927. Three children were born of the marriage, namely, Benjamin Colby, Jr., Frederick Jordan Colby, and Sarah Rob Colby, the latter two children being minors at the time of the filing of the bill of complaint herein, aged, respectively, eighteen years and fifteen years. The parties lived together as husband and wife and resided at 5815 Cedar Parkway, Chevy Chase, Montgomery County, Maryland, for something over four years prior to March 4, 1955.

On March 4, 1955, appellant, wife, without prior notice to appellee, husband, in company with her minor

daughter, Sarah Rob Colby, left the home in Chevy Chase, leaving a note to appellee. Appellant and her daughter stopped at Glencoe, Illinois, the home of appellant's mother, and went from there to Las Vegas, Nevada, where she arrived with her daughter on March 7, 1955.

Appellee engaged a detective in Washington, D. C., who went to Nevada and reported to him.

Appellee, husband, went to Las Vegas, Nevada, approximately March 20, 1955, and saw appellant. Appellee returned to his home in Montgomery County, Maryland, and went back to Las Vegas in April, 1955. He consulted a lawyer there to let him know when she (appellant) actually went up to the court to get a divorce. He also consulted lawyers in Washington, D. C.

On April 19, 1955, appellant filed suit for divorce *a vinculo matrimonii* in the Eighth Judical District Court of the State of Nevada, in and for the County of Clark, on the ground of extreme cruelty, mental in nature.

On June 9, 1955, appellee was served in Washington, D. C., with the process of the Nevada Court.

On June 30, 1955, the Nevada decree of divorce was granted to appellee, appellant having filed no answer or appearance in the proceedings.

On September 21, 1955, appellee filed a bill of complaint in the Circuit Court for Montgomery County, for divorce *a mensa et thoro*, on the ground of abandonment. Appellant, being served with the subpoena in Montgomery County, Maryland, answered, denied appellee's right to relief, and claimed that she had been absolutely divorced in Nevada, in accordance with the certified copy of the decree attached to the answer.

that the Circuit Court was without jurisdiction in the premises, and that appellee's bill, therefore, should be dismissed.

Testimony was taken before one of the standing examiners of the court and, upon the conclusion of appellee's (plaintiff below) testimony, motion for summary judgment was filed by appellant on the ground that the case contained no genuine dispute as to any material fact and that the defendant was entitled to judgment as a matter of law. This motion was overruled by the court.

On or about July 12, 1955, subsequent to the Nevada decree, appellant went from Las Vegas, Nevada, to Glencoe, Illinois, the home of her mother, and to Washington, D. C., on or about August 8, 1955. While at a luncheon with a friend at the Chevy Chase Club in Montgomery County, appellant was served with process in the instant case, as above stated.

On October 9, 1955, appellant returned to Las Vegas, Nevada.

On or about December 1, 1955, appellant again went to visit with her mother at Glencoe, Illinois, and to Washington, D. C., about December 7, 1955. She returned to Las Vegas in January, 1956, stopping at Glencoe, Illinois, to visit with her mother on or about January 6, and arrived in Las Vegas, January 17, 1956.

On February 21, 1956, appellant married Scott B. Appleby at Clark County, Las Vegas, Nevada.

Appellant never returned to sleep in Montgomery County or in the State of Maryland after leaving the Maryland home of the parties on March 4, 1955.

The following additional facts appear from the Record. Petitioner, Sarah Colby Appleby, was called as a witness for plaintiff, respondent here. Plaintiff's counsel stated that he was calling her "as an adverse party" and wanted "to exercise full rights to cross-examine her as an adverse party" (R. E21). [Article 35, Section 9, of the Maryland Code provides that an adverse party may be so called; but under Maryland law the party calling the adverse party is bound by the latter's testimony unless clearly impeached. Infra, page 11]. Petitioner testified that she went to Nevada "to live" (R. 21), that her plans when she went to Nevada were to live there indefinitely (R. E38). She never intended to return to Chevy Chase (Maryland) and did not want to be in the house where she had lived with her husband because of the terrible memories and associations, and that continued to be her mental disposition up to the time she testified (R. E88, 107). Apart from any other period, it was her intention to remain in Nevada through the summer of 1955 (R. E89). When respondent Colby went to Las Vegas to visit her, according to both his and her testimony, petitioner told him she was not coming back (R. 89). Through further examination of petitioner as his witness, counsel brought out that she had written several letters to her children in which she stated she could not come to *Washington, D. C.*, until after her divorce had been granted (R. 58, 59) and, under date of July 25, 1955, she wrote to respondent at the Chevy Chase, Maryland, address telling him she had to make *a visit* to Washington and asking him if he would have the Chevy Chase house put completely in her name so she could stay there. (R. 135).

On cross-examination defendant (petitioner) made the following statements: She had not lived at the

Chevy Chase address since she left March 4, 1955 (R. 81), planned to continue to live in Nevada indefinitely (R. E38, 81) and has never spent a night in Maryland since that date. She described her activities in Las Vegas, painting, church, Red Cross work, etc., and stated she was employed as a relief clerk at the Dunes Hotel Gift Shop beginning in October, 1955 (R. 22, 73). She referred to her activities in Maryland before leaving there March 4, 1955, and stated she notified the Nominating Committee of the Chevy Chase Garden Club that her name should not be on a ballot. She did not resign from the Ladies' Board of the House of Mercy "because I (she) didn't want to cause a lot of talk" but did resign from the Board of YWCA in writing (R. 24, 63). She applied for registration for an Austin automobile in Maryland February 24, 1955, but left it in Maryland for her son who was in college to use (R. 29, 30). She gave up her Las Vegas apartment upon receiving the divorce decree but rented a room in Las Vegas in which she left her personal belongings and went to see her mother in Chicago. At this time she knew respondent had six months within which to appeal the Nevada decree (R. 45, 48). She wanted her children to have the benefit of their social contacts in and around Chevy Chase, Maryland during Christmas holidays 1955 (R. 53, 56). In that connection, she visited Washington and stayed for a while at Christmas time in a house in the District of Columbia rented by her [illegible] in both their names. This was cheaper than having the children come to Las Vegas (R. 51). She worked in Nevada and had a social security card which she obtained there (R. 73). She bought an automobile while on a visit to Washington, D. C., in August, 1955. Her son, Benjamin, drove it to Nevada for her and she obtained

Nevada license plates and had the automobile insured in Nevada (R. 74, 77). Also, she applied to Federal authorities in Reno, Nevada, for extension of time to file here 1955 Federal income tax return (R. E75). Before going to Nevada she voted in Maryland, but qualified as a voter in Nevada while residing in Las Vegas (R. 81). While in Las Vegas petitioner looked at houses for sale. Her aunt had sent her money for down payment on a house in Las Vegas, but she did not buy as prices were too high (R. 89, 116). The record shows that petitioner retained a residence in Nevada until February 21, 1956, when she was married, in Las Vegas, Nevada, to Scott B. Appleby (R. 88, 89, 102). Respondent, as plaintiff in the Circuit Court, testified in his own behalf that he was personally served with process in the divorce action in Washington, D. C., on June 9, 1955 (R. 6), after volunteering by telegram to submit himself for service (Defendant's Exs. A & B, R. 172). He went to Nevada twice while petitioner was living there, the first time about March 20, 1955, and the second time in April, 1955, when he stayed about seven or eight days (R. 16). He retained a lawyer in Las Vegas, Russell Taylor, Esquire. Respondent instructed Mr. Taylor to let him know when petitioner went to court to get a divorce. He knew he could intervene in the Nevada action and get a jury trial (R. 18). Respondent did not formally appear in the Nevada proceedings or file any answer to the complaint (R. 18). He refused to answer questions put to him by petitioner's counsel as to whether his Nevada lawyer gave him a summary of the Nevada law and his rights thereunder. On June 6, 1955, respondent, plaintiff below, sent a telegram to petitioner, defendant below, addressed to her Las Vegas, Nevada, residence, advising her where and under what circum-

stances he might be served with process in the Nevada litigation (R. 172).

A decree of divorce a vinculo was entered in favor of petitioner on June 30, 1955 in the Eighth Judicial District, Nevada (R. 157).

On November 6, 1957, the Circuit Court for Montgomery County, Maryland, per Judge Kathryn Lawler, entered a decree declaring the divorce *a vinculo matrimonii* granted to petitioner in the Eighth Judicial District for the State of Nevada, "null, void and no effect in law or equity" and awarded plaintiff, respondent here, a divorce *a mensa et thoro* from defendant, petitioner here. On May 20, 1958, the action of the Circuit Court for Montgomery County, Maryland, was affirmed by the Court of Appeals of Maryland.

ARGUMENT IN SUPPORT OF PETITION

Basic Principles of Law Involved

Petitioner assumes that certain principles of law announced in the second Williams case, *Williams* v. *State of North Carolina*, 325 U.S. at page 234 (65 S. Ct. at page 1097) and in the case of *Cook* v. *Cook*, 342 U.S. 126 at page 128; 72 S. Ct. 157 at page 159 are in effect and applicable here, namely--

(1) Under the full faith and credit clause, a state court judgment is entitled to the same credit and effect in other states that it has in the state where it was pronounced when jurisdiction of the subject matter or person is not clearly impeached in other states.

(2) "If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself."

Quotation in *Cook* v. *Cook*, *supra*, from the opinion of Justice Stone in *Adams* v. *Sanger*, 303 U.S. 59, 62; 58 S. Ct. 454, 456.

(3) The burden of undermining the verity which a Nevada decree of divorce imports rests heavily upon the assailant.

It is submitted that the courts below ignored these principles in finding, contrary to the record, that petitioner did not acquire a bona fide domicile in Nevada.

The Nevada Decree Was Not Open to Collateral attack If Appellant Was a Bona Fide Resident of Nevada When She Obtained Her Divorce

Even though respondent was neither personally served within Nevada nor entered an appearance in the Nevada action the Nevada divorce decree is not open to collateral attack if Petitioner was a bona fide domiciliary or resident of Nevada at the time she brought her action there and obtained her divorce—

Sherrer v. *Sherrer*, 334 U.S. 343, 68 S. Ct. 1087;
Cook v. *Cook*, 342 U.S. 126, 72 S. Ct. 157.

The rule that the bona fide residence of plaintiff in the divorcing state gives the Court there jurisdiction even though defendant was not personally served in that state or appeared in the action is spelled out in Mr. Justice Frankfurter's dissent in the *Cook* case 342 U.S. 126, 72 S. Ct. 157.

See also *Sutton* v. *Leib*, 342 U.S. 402, 72 S. Ct. 398.

Petitioner Had the Right to Go to Nevada to Obtain a Divorce

The Court of Appeals of Maryland has well stated the law to be that a spouse may change his domicile for the purpose of obtaining a divorce:

"* * * A state never could forbid a domicilliary to change his domicil in order to obtain a divorce * * *." *Epstein* v. *Epstein*, 66 A. 2d 381 at p. 383.

See also *Cheever* v. *Wilson*, 76 U.S. 108, 9 Wall 108; *Williams* v. *State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207.

Petitioner Abandoned Her Maryland Domicile and Never Returned to That State; Hence, She Acquired a Legal Domicile in Nevada Where She Resided for More Than a Year

The Agreed Statement of Undisputed Facts shows that petitioner "never returned to sleep in Montgomery County or in the State of Maryland after leaving the Maryland home of the parties on March 4, 1955."

Furthermore, by plaintiff's (respondent's) own examination of petitioner (defendant) as his witness, it was established that at the time she left Maryland on March 4, 1955, up through the time of her testimony more than a year later, she had no intention of ever returning to Maryland.

Article 35, Section 9, of the Maryland Code provides—

"*Adverse Party May Be Called, Interrogated And Impeached.* In any suit or proceeding in equity in any Court of this State any party may call as a witness any adverse party * * * and interrogate him by leading questions and contradict him in every respect as if he had been called by the adverse party."

The Court of Appeals of Maryland has declared that under the above statute a litigant calling the adverse party is bound by the latter's evidence unless clearly impeached. *Murphy* v. *Stubblefield*, 133 Md. 23; 104 A.T. 259.

Persons are domiciled (in a state) in which they live who have no fixed and definite intention to return and make their homes where they were formerly domiciled. *Rogers* v. *Rogers*, 76 U.S. App. D.C. 297 (see 2, 3 page 298) citing *D. C.* v. *Murphy*, 314 U.S. 441, 62 S. Ct. 303.

In the Williams cases and in others wherein this Honorable Court has denied Full Faith and Credit, it will be noted that the plaintiff in the Nevada case returned to the state of original domicile after the decree was rendered in Nevada and again took up residence in the state of original domicile.

Petitioner not only testified as a witness for the plaintiff that when she left Maryland she had no intention of ever returning there, but respondent Colby testified that she so advised him when he went to see her in Las Vegas. She had irrevocably left Colby and given up her residence in Montgomery County. She had no place in Montgomery County or in the State of Maryland to which she could return and live for even one night without returning to Colby, who continued to occupy and assert dominion over the former marital residence at 5815 Cedar Parkway, Chevy Chase. In certain letters that she wrote to her children she did refer to the fact that she expected to travel to *Washington, D. C.* but in every instance the detailed testimony will show that she was going there temporarily for a special purpose and that after those special purposes had been accomplished she had the intention to and did return to her apartment in Las Vegas. She actually lived in Las Vegas for about a year, March 7, 1955, to the time when she was married in April, 1956. She has never returned to the State of Maryland except for the purpose of getting some

additional personal belongings, testifying in this case, and once (when she was served in this suit) for the purpose of having luncheon at the Chevy Chase Club with a friend.

In Story's Conflict of Laws, 7th Edition, Sec. 46, it is stated:

> "If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period."

The situation in the Colby case is very similar to one which was adjudicated in *Goodloe v. Hauck*, 72 App. D.C. 287, wherein the opinion was written by Justice Vinson, later Chief Justice of the Supreme Court of the United States. In that case a wife, partner to a District of Columbia marital domicile, had gone to the State of Virginia and secured a divorce after residing there for the statutory period. Almost immediately thereafter she returned to the District of Columbia and remarried. The man she married in the District was one who had encouraged her to secure the Virginia decree, and he later asked the court to annul his marriage on the ground that his wife's Virginia divorce from her first husband was invalid as she was not a bona fide resident of Virginia. In dismissing the plaintiff's suit, Justice Vinson stated:

> "Under our previous decisions the decree of the Virginia court granting the appellee a divorce from her first husband will be recognized here if it is valid under the law of Virginia, i.e., if she was domiciled in and a bona fide resident of Virginia as required by the divorce statute there, and if no

fraud was committed on the Virginia court in respect to Hawk's alleged desertion. The District Court expressly found that the appellee was a bona fide resident of Virginia and its finding that the decree was valid amounts to a finding that Hawk did desert her and that no fraud was practiced on the Virginia court in this respect. Those findings are amply supported by the record and cannot therefore be disturbed by this court on appeal.

"That leaves only the question whether the appellee by moving to Virginia acquired a Virginia domicile. Neither the fact that she went there motivated by a desire to obtain a divorce, nor the fact that she left some time after securing it forecloses this issue if it can be said she had at one time during her residence there an intention to remain for an indefinite period. Although on the facts as stated that might seem doubtful, the District Court in an independent inquiry concluded, as the Virginia court originally, that she did acquire a Virginia domicile. In light of the strong presumption in favor of the Virginia court's finding on this issue, the character of the evidence introduced in the District Court, and the rule that District Court findings in this type of case will not be disturbed unless manifestly erroneous, we are unwilling to disturb that finding. We need not, however, rest our decision on that ground alone for we are of the opinion that under the circumstances the Virginia court's finding that the appellee acquired a Virginia domicile is conclusive in this litigation."

The law abhors a vacuum. Can it be said in the face of her clear intention to abandon Maryland as a residence and domicile, the fact that she never returned there, and her actual residence in Nevada, that between March 4, 1955 and February 21, 1956 petitioner was without a domicile?

The burden rested heavily upon plaintiff below (respondent) to prove that petitioner was not domiciled in Nevada and that the Nevada courts were without jurisdiction to hear and determine her complaint. It is submitted that he utterly failed to sustain that burden.

Fallacy in Opinions Below

Both the Circuit Court for Montgomery County and the Court of Appeals of Maryland seemed to think that a casual expression of intention on part of petitioner sometime to leave Nevada and make a home in the *District of Columbia* was equivalent to an intention on her part to return to the *State of Maryland*. In her written opinion the Circuit Court Judge clearly indicates that she felt an intention on the part of the former Maryland resident, petitioner, to ultimately settle in the District of Columbia was the equivalent of re-establishing her Maryland domicile, stating parenthetically "Montgomery County is considered by me to be part of the greater metropolitan area of our Nation's Capital." This observation obviously was intended to support the Judge's view that petitioner's two visits to Washington while allegedly maintaining a Nevada residence were equivalent to returning to Maryland, as she refers to "the Washington area", "the Washington metropolitan area", "Montgomery County, Maryland, and its environs" and "the District of Columbia" at four different points in her opinion in support of the theme that "an early return to the original domicile after obtaining a 'tourist divorce'" was applicable in this case (R. 10, 11).

The Court of Appeals of Maryland also stresses in its opinion petitioner's visits to the District of Colum-

bia and her stay there during the Christmas 1955-56 holidays in a house leased by her aunt there as though those visits constituted a reaffirmation of her Maryland domicile.

The Question Whether Petitioner Was a Bona Fide Domiciliary of Nevada Is One for the Nevada Court

The question as to whether the petitioner was actually a domiciliary of the state which granted her a divorce is one for the court which granted the divorce. *Williams* v. *North Carolina*, 65 S. Ct. 1092 at pages 1096 and 1097.

The Supreme Court of Nevada in many cases has held that a wife may acquire and maintain a domicile separate from that of her husband; *Merritt* v. *Merritt*, 160 P. 22, 164 P. 644; 40 Nevada 385; and that the residence of plaintiff in a divorce action is a question of fact to be determined by the Nevada Trial Court, *Blakeslee* v. *Blakeslee*, 168 P. 950; 41 Nevada 235.

In *Walker* v. *Walker*, 198 P. 433; 45 Nevada 105, the Supreme Court of Nevada said at p. 109:

> There is no rule of law which prevents one from changing his domicile in order to facilitate his obtaining a divorce, or to secure other advantages he may think the law of the new domicile may afford him."

The Plaintiff Below Did Not Show Petitioner's Nevada Domicile to be Other Than Bona Fide

Respondent, having asked Maryland to declare invalid the judgment of the State of Nevada, and thus attacked the constitutionality of the decree of the Nevada Court, had the burden of proving his contention to be correct. This burden rests heavily upon him

(*Williams* v. *State of North Carolina*, 325 U.S. 225, 65 S. Ct. 1092; *Cook* v. *Cook*, 342 U.S. 126, 72 S. Ct. 157. This burden was not sustained.

The Respondent failed to show of what jurisdiction other than Nevada petitioner was a domiciliary. For one to be able to retain his domicile in one state upon moving to another state and residing therein he must always retain an intention to return—even though the time of return be indefinite. *Sweeney* v. *District of Columbia*, 72 App. D.C. 30, cert. den. 310 U.S. 631, 60 S. Ct. 1082 (see (5), (6) page 33 and footnote 10 same page).

Had petitioner actually returned to Maryland to live the Maryland cases of *Walker* v. *Walker*, 125 Md. 649; *Epstein* v. *Epstein*, 66 A. 2d 381, and *Brewster* v. *Brewster*, 144 A. 2d 53, may properly have supported the Chancellor's finding that her residence in Nevada was not *bona fide*. But there is no place in the law for the reasoning that because according to the Chancellor "Montgomery County (Maryland) is considered by many as a part of the greater Metropolitan Area of our Nation's Capital", domiciliaries of Montgomery County, Maryland are likewise domiciliaries of Washington, District of Columbia and nearby Virginia, and *vice versa*, or, that a domiciliary of Montgomery County Maryland, retains his domicile there when he abandons that county and state and goes to another state where he lives for a while and then "returns" to live in the District of Columbia or nearby Virginia.

Were the Chancellor's statement of the law correct it would be impossible for a domiciliary of Montgomery County, Maryland, to relinquish or abandon that domicile by going to the District of Columbia or Virginia to live or *vice versa*.

"* * * To acquire a domicil of choice the law requires the physicial presence of a person at the place of the domicile claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicil is instantaneous. Intention to live permanently at the claimed domicil is not required. If a person capable of making his choice honestly regards a place as his present home, the motive prompting him is immaterial. Restatement of Conflict of Laws, secs. 15, 22." *Spurgeon* v. *Mission State Bank*, (CCA 8) 151 F. 2d 702 at pp. 705, 706.

See also *Hanson* v. *Hanson*, 151 N.Y.S. 861, 863, 88 Misc. 244. *Shilkret* v. *Helvering*, 78 U.S. App. D.C. 178; *DeMarcos* v. *Overholzer*, 74 App. D.C. 42.

The record shows petitioner went to Nevada and stayed there for more than the requisite period of time required by that state to give it jurisdiction to entertain her action for divorce. It also shows *inter alia* that she obtained employment there; that she qualified as a Nevada voter; that she asserted her Nevada domicile in her Federal income tax return; that she accepted $2,000 from her aunt to use as a down payment on a house in Nevada; that she applied for and obtained a social security card enabling her to seek employment in Nevada; and that in September 1955 while on the visit to the District of Columbia during which she was served with process herein while attending a luncheon at the Chevy Chase Club she still maintained living quarters in Nevada.

In the agreed statement of undisputed facts it is provided—

"Appellant never returned to *sleep* in Montgomery County or in the State of Maryland after

leaving the Maryland home of the parties on March 4, 1955." (italicized word insisted upon by appellee).

The record is clear tha since March 4, 1955, appellant has never been in Mo. gomery County, Maryland, except to pick up some art cles from her former home on Cedar Parkway; to attend the luncheon at Chevy Chase Club at which she was served with process herein; and for the purpose of testifying in this case.

The Actions of Respondent Foreclosed His Right to Collaterally Attack the Decree of the Nevada Court

This case is factually unique among the reported cases involving collateral attacks on divorce decrees:

Benjamin Colby followed his wife to Las Vegas, Nevada (R. 16). He employed a detective to cover his wife's activities while in Nevada and report to him from time to time thereon (R. 17). He also consulted a lawyer in Nevada (R. 18) and employed counsel in Las Vegas to keep him informed of the progress of appellant's divorce action against him (R. 18). He also talked with an attorney in Washington, D. C. (R. 19). Colby went to Nevada *twice* between the time his wife arrived there and June 9, 1955, when he was personally served with process of the Nevada Court in Washington, D. C. (R. 16, 17). But after being so served he stayed away from Nevada (R. 16). He even went so far as possible to lead his wife to think he would appear in the Nevada action (R. 18, 19). He then telegraphed her that he would not (R. 172). He even assisted his wife in procuring her Nevada divorce to the extent that he advised her when and where he would be available for service of process by telegraphing her on June 6, (1955):

> "In case you wish to reach me am now at home and office at usual hours." (R. 172.)

and again on June 10, 1955:

> "Referring to my second telegram Wednesday keep in mind that if I had not decided against appearing and had maintained my decision to ask for jury trial you would have had to stay there at least twelve months please consider this in your relations with the children." (R. 172.)

Mr. Colby was in Nevada twice before he was served. He could easily have accepted service there and raised before the Nevada Court whatever questions concerning that Court's jurisdiction or the merits of his wife's action he thought he had. He did not do that.

He flouted the Nevada Courts to the extent that he made sure service would be had upon him outside that state and he did not raise in the Nevada Court (the normal and proper forum) the question of its jurisdiction.

Colby's bill in the Montgomery Circuit Court prayed for a divorce *a mensa et thoro* and the custody of his minor children

> "for such periods and in such manner, including the right to determine the future education of said minors, as the Court may determine to be for their best interests," (R. 4)

but at argument he dropped completely his prayer for custody (R. 14—last paragraph of Trial Court's opinion).

If he had sincerely wished to obtain even limited custody of his two minor children (which obviously he did not wish to do else he would not have dropped that

issue) he could and should have initiated an action therefor in the Maryland Courts without raising the question of the validity of the Nevada decree.

The question of the custody of the minor Frederick Jordan Colby was not raised or adjudicated in the Nevada proceedings and therefore that question could have and should have been raised and determined without regard to the Nevada proceedings.

With respect to the custody of Sarah Rob (which was prayed in the Nevada proceedings) the Nevada Court provided—

> "The Court hereby retains jurisdiction of this action and the parties hereto for the sole purpose of making such other and further orders regarding the care, custody, control and maintenance of the said minor child of the parties as to the Court may from time to time seem just and proper." (R. 157.)

Therefore, with respect to the daughter's custody, inasmuch as the Nevada custody decree was not final there was no need or reason for Colby to collaterally attack the divorce decree of the Nevada courts in his Maryland action. The action he should have brought and the one the lower court should have entertained was one for modification of the custody decree of the Nevada court. (*State of New York ex rel. Halvey* v. *Halvey*, 330 U.S. 610, 67 S. Ct. 903.)

If Colby had any sincere desire to get petitioner to resume her married life with him a law suit would seem the means least likely to accomplish that end. However, it is obvious from the Bill that that was not his purpose as he asks the Court for a legal separation—thus acknowledging that he is not desirous of healing the marital breach.

It is respectfully submitted that Colby's real purpose in bringing this case was to try to successfully litigate the question he felt confident he could not successfully raise in the Nevada Court: The jurisdiction of that Court to entertain petitioner's action for divorce against him. But the question of the jurisdiction of the Nevada Court to entertain her action against him was one of fact to be determined by that Court. *Fleming* v. *Fleming*, 36 Nev. 135, 134 Pac. 445.

The law of estoppel makes the acts and conduct of a party binding against him whenever they should be so and will not permit him to assert any claim to the contrary. Thus, he himself makes the law of his case and he must abide the consequences. *Hill* v. *Farmers & M. Nat. Bank*, 97 U.S. 450.

The acts of the respondent, Colby, were such as to shock the conscience of a Court of Equity:

Boulden v. *Lanhan*, 29 Md. 200;
Elgin v. *Housing Authority of City of Frederick*, 52 F. Supp. 250;
Rody v. *Doyle*, 29 A. 2d 290, 181 Md. 195.

The Supreme Court of the United States Has Never Sustained a Collateral Attack on an "Ex-Parte" Divorce Decree at the Instance of One Who Was Physically Present in the Granting State With Every Opportunity to Litigate the Jurisdictional Question in the Forum

Respondent Colby had every opportunity to raise the jurisdictional question in the State of Nevada without any hardship whatsoever to himself as he was personally physically present within the State upon two occasions during the period between the time petitioner went there to live and filed her suit for divorce, and was represented by counsel. But instead of so litigating he chose to remain silent then and after

Nevada had acted invoke the assistance of the Courts of Maryland to have the Nevada decree nullified.

In cases involving the permissible limitations on the full faith and credit clause this Honorable Court has (since hearing the first Williams case in 1942, *Williams* v. *State of North Carolina*, 317 U.S. 287; 63 S. Ct. 207) heard twelve cases in which the validity of the judgment of one State was attacked in an action brought in another State.

The first of these cases was the second Williams case (*Williams* v. *State of North Carolina*, 325 U.S. 225, 65 S. Ct. 1092) decided in 1945. In that case the Supreme Court upheld the right of the State of North Carolina to discharge its clear duty of punishing persons wound within its borders and subject to its laws for contravention thereof.

After the second Williams case came the case of *Eisenwain* v. *Pennsylvania*, 325 U.S. 279, 65 S. Ct. 1118. Here the husband after having left his domicile and wife in Pennsylvania gone to Nevada and obtained a divorce and then gone to Ohio to live returned to Pennsylvania and the jurisdiction of its courts to sue for termination of the support order his wife had obtained there prior to entry of the Nevada decree. His contention was that the Nevada divorce terminated the support order under the Pennsylvania law which holds that a support order does not survive divorce. The Supreme Court held that the Nevada divorce decree did not invalidate the earlier support order of the Pennsylvania Court. The concurring opinions of Associate Justices Douglas and Rutledge clearly distinguish the Eisenwain case from the second Williams case and explain that the jurisdictional foundation for a decree

in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extra-territorial effect. As Mr. Justice Douglas stated (at pages 1119-1120 of 65 S. Ct.):

> "We held in Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207 * * * that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman who Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See Yarborough v. Yarborough, * * *. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. * * * The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. * * * The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. * * * One must give way in the larger interest of the federal union. But the same con-

fliet is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all."

In *Griffin* v. *Griffin*, 327 U.S. 220, 66 S. Ct. 556, the question before the Court was the validity of a New York judgment declaring a wife entitled to recover a fixed sum as arrears in alimony awarded under a previous order of the New York Courts which judgment having been docketed without notice (personal or constructive) to the defendant the wife had attempted to collect in an action brought thereon in the District of Columbia. The Court held the docketing of the *in personam* judgment by the New York Court invalid for want of due process.

The question before the Court in *People of the State of New York ex rel. Halvey* v. *Halvey*, 330 U.S. 610, 67 S. Ct. 903, was not the validity of the Florida divorce decree obtained by a former New York resident, but the power the New York Courts had to modify the Florida Court's award of custody of the minor child of the parties. The Court held that the award of custody being open to modification in the Court of Florida was also subject to modification in the Courts of New York, so far as the full faith and credit clause was concerned.

The question for determination in the case of *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 S. Ct. 1087, was whether a citizen and resident of Massachusetts who had appeared and contested the Florida divorce suit instituted by his wife, and there contested the jurisdiction of the Florida court could relitigate the jurisdictional question in the State of Massachusetts. The Court held he could not.

The question in *Coe* v. *Coe*, 334 U.S. 378, 68 S. Ct. 1094, was whether the Nevada judgment awarding divorce and alimony to a wife (who was formerly a resident of Massachusetts) on the cross-claim she had filed to the divorce suit instituted by her husband in which she had personally appeared was subject to collateral attack in the Courts of Massachusetts. The Court held it was not.

In *Estin* v. *Estin*, 334 U.S. 541, 68 S. Ct. 1213, where after a wife resident in New York had obtained there a support order against her husband who then went to Nevada and there divorced her, the question for determination was whether the Nevada Court absent personal service upon the defendant could adjudicate the wife's rights in the New York judgment. In deciding that the Nevada Court could not the Supreme Court as it had done in *Eisenwain* v. *Pennsylvania*, 325 U.S. 279, 65 S. Ct. 1118 clearly explained the difference between the personal service within the jurisdiction of the trial Court required to support a money judgment and the constructive service of process without the jurisdiction of the Court which is all that is required to give the trial court the power to enter judgment in an action for divorce. To like effect is *Kreiger* v. *Kreiger*, 334 U.S. 555, 68 S. Ct. 1221.

In the case of *Rice* v. *Rice*, 336 U.S. 674, 69 S. Ct. 751, the Supreme Court did declare the divorce decree

of the Nevada Court null and void in Connecticut. But by so doing it enabled Connecticut to determine the ownership of Connecticut property left by its erstwhile domiciliary who had gone to Nevada obtained a divorce there and then gone to California where he died.

In dissenting Mr. Justice Jackson stated, 69 S. Ct. at pp. 752 and 754:

> "Since this case involves only reappraisal of evidence, and we decline to do that, it is hard to see a reason for granting certiorari unless it was to record in our reports an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece.' The question is whether property owned in Connecticut by one who has obtained a Nevada divorce and remarried in that State can be taken from his acting widow and bestowed upon the woman she superseded."
>
> * * *
>
> "This Court is not responsible for all the contradictions and conflicts resulting from our federal system or from our crazy quilt of divorce laws, but we are certainly compounding those difficulties by repudiating the usual requirements of procedural due process in divorce cases and compensating for it by repudiating the Full Faith and Credit Clause. My dissenting views in the Williams and Estin cases would lead me to affirm the judgment below, because I believe this divorce was always and in all places invalid on due process grounds for want of jurisdiction of the defendant. However, if it was valid on that ground and nothing but a review of the evidence of domicile by the second state court is involved, we should not grant writs in this class of cases; but if I am to review the evidence here, I think the Nevada court's finding of jurisdiction was based on substantial evidence of domicile, not overcome by any new evidence before the Connecticut court, and the Nevada judg-

ment should be given full faith and credit as the Congress has commanded."

The question before the Court in *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S. Ct. 47, was whether a third party (the daughter of a party) could collaterally attack a divorce decree entered in a suit in which the defendant had personally appeared and participated. The Court held that she could not.

In the case of *Vanderbilt* v. *Vanderbilt* (1957), 354 U.S. 417, 77 S. Ct. 1360, the Court held that a valid Nevada divorce in which defendant wife a California resident did not appear and was not personally served did not preclude the State of New York in which property belonging to the husband was located from awarding alimony to the wife in the action she brought there for separation and alimony subsequent to the Nevada divorce judgment.

The Court in *Cook* v. *Cook*, 342 U.S. 126, 2 S. Ct. 157 (also decided since the second Williams case) in remanding to the trial court simply reemphasized the well known rule that until the jurisdiction of the state in which the divorce was granted was shown to be vulnerable a sister state may not relitigate the issue of domicile on which the divorce decree rested.

In the case of *May* v. *Anderson*, 345 U.S. 528, 73 S. Ct. 840, the court held that in personam jurisdiction of the mother is required to enable the courts of a state in which she is not domiciled to award custody of minor children to the father.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 215

SEPTEMBER TERM, 1957

SARAH P. COLBY

v.

BENJAMIN COLBY

BRUNE, C. J.
HENDERSON
HAMMOND
HORNEY,
JJ.

Opinion by Horney, J.

Filed: May 20, 1958

This is an appeal from a determination by the Circuit Court for Montgomery County that a divorce *a vinculo matrimonii* obtained in Nevada by the appellant, Sarah P. Colby (the wife), was null and void, and that the appellee, Benjamin Colby (the husband), was entitled to a Maryland divorce *a mensa et thoro*.

Benjamin and Sarah Colby were married in Chicago in 1927, had three children, and lived together in Chevy Chase for over four years prior to March 4, 1955. On the latter date, the wife, without prior notice to her husband, took their fifteen year old daughter and went to the home of the wife's mother in Glencoe, Illinois, and immediately thereafter, went to Las Vegas, Nevada. The husband hired a detective in Washington, D. C., to go to Las Vegas and report on his wife's activities. The wife had been regularly corresponding with one Scott B. Appleby, and she had discussed with his Washington attorney her plans for a trip to Nevada. Immediately upon her arrival in

Las Vegas, she consulted an attorney, with whom arrangements had previously been made. On March 20, the husband went to Las Vegas to see his wife, returned to Montgomery County, but went back to Las Vegas in April to consult a lawyer who was to inform him if a divorce proceeding was filed. In the meantime the wife made a return train reservation for April 25th but subsequently cancelled it, and on April 19, 1955, exactly six weeks after her arrival, she filed suit for a divorce in Nevada on the ground of extreme mental cruelty. She made plans to return to Washington after the divorce proceedings by making a reservation at a Washington hotel. On June 9, the husband was served in Washington with Nevada process, and twenty-one days later, the Nevada court granted a decree of divorce.

On July 12, the wife went to Glencoe, and two weeks later wrote to her husband requesting him to put the title to their home in her name, so that she could stay there. In August, she returned to Washington and rented a house on Utah Avenue. On September 21, the husband filed his bill for a partial divorce on the ground of abandonment. The wife, when served with process, answered that the decree of the Nevada court had already divorced the parties. In October of 1955, she returned to Las Vegas and rented another apartment there, but still kept her Utah Avenue house in Washington. In December, she went back to her mother's home n Illinois and then returned to Washington. In January of 1956, she again reversed her route by going to Illinois and then to Las Vegas. Finally, on February 21, 1956, she married Appleby in Las Vegas. In 1957, the chancellor in Maryland found that Sarah Colby had not in fact been divorced, and then awarded a partial divorce to Benjamin Colby.

There is considerable evidence in the record to substantiate the chancellor's conclusion that the wife was not a bona fide domiciliary of Nevada. Although she was ac-

customed to living in a spacious private home in Maryland, she resided in an apartment in Nevada and never made an attempt to purchase a home there. Although she had many philanthropic interests in Maryland and Washington, she had none in Nevada. Although most of her relatives and friends lived in the east, none of her relative or close friends lived west of the Mississippi. Her three children went to eastern schools, and she had no intention of taking them to Nevada for schooling. When she rented an automobile in Nevada, she gave a Maryland address. Her only belongings in Nevada were kept in two suitcases; the rest of her clothing remained in Chevy Chase. She never changed her permanent mailing address to Las Vegas. And she retained her charge accounts in Washington stores and opened no accounts in Nevada.

The primary issue in this case is whether the husband is estopped from collaterally attacking the decree of the Nevada court. The wife insists that since the husband actually went to Nevada on two different occasions before the Nevada decree was entered, he could have accepted service there and raised at that time any meritorious defenses he may have had. Her argument is that he "flouted" the Nevada court by making certain that he would not be served in that state. In other words, because he had the opportunity to raise the jurisdictional question in Nevada without any hardship to himself, he should be thereafter barred from collaterally attacking the Nevada decree. The husband, on the contrary, contends that the wife's claim of "estoppel" is specious. The theory advanced by the wife is without merit.

First, the record clearly shows that, although the husband was in Nevada during March of 1955, and at another time on April 17 or 18, 1955, the divorce suit filed by the wife was not instituted until April 19, 1955, *after* the husband's brief sojourn in Nevada. In other words, from the factual point of view, the husband was not in Nevada when

his wife filed suit and therefore did not have the "opportunity" referred to by the wife to defend the action on the jurisdictional question. Of course, he could have remained in Nevada to contest the suit but there is no evidence that he definitely knew when the wife would file suit. Besides he was under no legal compulsion to remain.

Second, it could be argued that the husband had the opportunity to employ a Nevada attorney to contest the divorce. Such an opportunity, however, was not sufficient to bar the husband from subsequently attacking the decree collaterally in this State. The same opportunity was afforded the defendants (Carrie Williams and Thomas Hendrix) in the two Nevada divorce proceeding referred to in the noted *Williams* cases—317 U.S. 287 and 325 U.S. 226. And yet the Supreme Court permitted a collateral attack on the Nevada decrees in the subsequent prosecutions for bigamy of the respective spouses of the defendants in the Nevada proceedings (O. B. Williams and Lillie Shaver Hendrix), who later married in Nevada and returned to North Carolina to reside.

Third, the Supreme Court has expressly delineated the kinds of situations which will estop an absent defendant from relitigating the jurisdictional issue, and the instant case does not fall within any of the previously stated situations. In *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948), one of the leading cases, the wife left her husband in Massachusetts and went to Florida with their two children. She obtained employment there, and placed one child in school. She informed her husband that she did not intend to return. After a three months' residence in Florida, she filed suit for a divorce. The husband retained Florida counsel, entered a general appearance, denied that his wife was domiciled in Florida, and appeared personally at the hearing to testify concerning the custody of the children. At the trial, however, counsel for the husband did not cross-examine the wife on the issue of domicile, nor did he offer

any rebutting evidence. The court granted the divorce, and no appeal was taken. The wife remarried two days after the divorce and remained in Florida with the second husband for awhile. They then returned to Massachusetts. The first husband instituted a proceeding in Massachusetts attacking the validity of the Florida decree. The Massachusetts courts, in finding for the first husband, held that the full faith and credit requirements did not preclude him from re-examining the finding of domicile by the Florida court. The Supreme Court reversed, pointing out that the husband had had full opportunity to litigate *all* of the issues when he appeared in the Florida proceeding. The issues, therefore, was essentially one of res judimata. The Florida court had jurisdiction to decide the question of its own jurisdiction, and when it did so with all of the parties before it, its determination was entitled to full faith and credit in the Massachusetts courts.

A similar result was reached on the same day in *Coe* v. *Coe*, 334 U.S. 378 (1948). Here again the defendant in the divorce action appeared but did not raise the jurisdictional question. And here again, the Supreme Court held that the participation of the defendant in the divorce action—he had pleaded to the merits—barred collateral attack on the jurisdiction. The results of the *Sherrer* and *Coe* cases should not have been entirely unexpected. In 1938, the Supreme Court had held that where the defendant contests the issue of the plaintiff's domicile in a divorce proceeding, res judicata will be applicable. *Davis* v. *Davis*, 305 U.S. 32. And the doctrine of res judicata as to jurisdiction has been applied in other fields than that of divorce even where a jurisdictional question was not raised in the initial proceeding. *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940); "Res Judicata," 65 Harv. L. Rev. 818, 853 (1952).

The extent of the *Sherrer* and *Coe* cases, *supra*, has not been free from doubt, however. In 1951, the Supreme

Court listed in *Cook* v. *Cook*, 342 U. S. 126, the circumstances in which a relitigation of jurisdiction will not be permitted, when it said:

> "If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (*Sherrer* v. *Sherrer*, 334 U. S. 343) or appeared and admitted her Florida domicile (*Coe* v. *Coe*, 343 U. S. 378) or was personally served in the divorce state (*Johnson* v. *Muelberger*, 340 U. S. 581, 587), he would be barred from attacking the decree collaterally. * * * On the other hand, if the defendant spouse had neither appeared nor been served in Florida, the Vermont court, under the ruling in *Williams* v. *North Carolina*, 325 U. S. 226, could reopen the issue of domicile."

The Supreme Court did point out in the *Cook* case that the decree of the divorce-granting state is entitled to a presumption of validity. However, "[t]hat presumption may, of course, be overcome by showing, for example, that * * * [the defendant] never was served in Florida nor made an appearance in the case either generally or specially to contest the jurisdictional issue." In the case at bar, the husband has rebutted the presumption of validity to which the Nevada finding was entitled by showing that he neither was served in Nevada nor made an appearance of any sort in the proceedings in that State. Since the Supreme Court requires a defendant to have had some contact with the divorce-granting state before the divorce proceeding becomes res judicata as to him, it is clear that the requirement laid down by that Court entitling a defendant to relitigate the jurisdictional issue in his own state has been met by the husband in this case.

Some of the states have interpreted the *Sherrer* and *Coe* cases, *supra*, quite narrowly in order to permit a state to regulate the marital status of those whom it considers to be its domiciliaries. New Jersey, for example, permitted collateral attack on a Florida divorce decree by a wife who

had, in return for a proper settlement, agreed to confer jurisdiction on a Florida court by entering an appearance through counsel engaged by her husband. *Staedler* v. *Staedler*, 6 N. J. 380, 78 A. 2d 896 (1951). See also *Brasier* v. *Brasier*, 200 Okla. 689, 200 P. 2d 427 (1948), [collateral attack allowed where defendant had executed a written entry of appearance, but did not appear in person, filed no pleadings, and was not represented by counsel in divorce action]; *Chirelstein* v. *Chirelstein*, 8 N. J. Super. 504, 73 A. 2d 628 (1950), *modified on other grounds*, 12 N. J. Super. 68, 70 A. 2d 884 (1951), [collateral attack allowed where defendant filed a perfunctory answer, and it was admitted that domicile was fraudulent]; *Davis* v. *Davis*, 259 Wis. 1, 47 N. W. 2d 338 (1951), [collateral attack allowed where defendant filed a special appearance in divorce proceedings]; *Gromacko* v. *Gromacko*, 110 Cal. App. 2d 117, 242 P. 2d 43 (1952), [collateral attack allowed where power of attorney obtained from defendant was acquired by fraud and duress]; *Eaton* v. *Eaton*, 227 La. 992, 81 So. 2d 371 (1955), [collateral attack allowed where defendant signed waiver of summons and entry of appearance in divorce action, but papers were never filed]; and *Zenker* v. *Zenker*, 161 Neb. 200, 72 N. W. 2d 809 (1955), [collateral attack allowed where there was fraudulent service of process on defendant]. Although it is difficult to reconcile all of these decisions with the *Sherrer* and *Coe* cases, *supra*, they at least support what the Supreme Court of Nebraska stated in *Zenker* v. *Zenker*, *supra*:

> "[The Supreme Court decisions] each cover a very narrow situation, and * * * they will not be applied to situations other than those which they specifically decide."

The instant case does not seem to us to call for an application of the doctrine of res judicata, or require the Nevada decree to be given full faith and credit. Since it is clear that the husband in this case never participated to the

slightest extent in the Nevada proceeding he was not barred from relitigating the jurisdictional question in a collateral proceeding in this State. It follows that the partial divorce granted by the Circuit Court for Montgomery County should be affirmed.

DECREE AFFIRMED, THE APPELLEE TO PAY THE COSTS.

Office-Supreme Court, U.S.
FILED
SEP 4 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 281

SARAH P. (COLBY) APPLEBY, *Petitioner*

v.

BENJAMIN COLBY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 281

SARAH P. (COLBY) ATELARY, *Petitioner*

v.

BENJAMIN COLBY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

---

BRIEF FOR RESPONDENT IN OPPOSITION

This is a proceeding seeking to review a judgment of the Court of Appeals of Maryland in a divorce case granting respondent-husband a divorce and finding as an incident thereof that a previous ex parte divorce obtained by the petitioner-wife, in Nevada was void because the Nevada court was without jurisdiction, in that petitioner was not a domiciliary of Nevada at the time of her application for and the granting of the divorce.

QUESTION PRESENTED

The question presented is whether a petition for a writ of certiorari will be granted where, on the pleadings, the evidence and the posture of the case below, the only real issue is whether the state trial court erred in finding as a fact, on substantial evidence, that petitioner was not a domiciliary of Nevada, and that, therefore, the Nevada court was without jurisdiction to grant her an ex parte divorce.

COUNTER-STATEMENT OF THE FACTS

Because of inability of counsel to agree further in composing the record on appeal to the Court of Appeals of Maryland, the agreed statement of undisputed facts set out in the petition (pp. 3-5) contains almost none of the mass of evidence bearing on the factual issue whether or not petitioner was truly a domiciliary of Nevada when she applied for and was granted an ex parte decree of divorce there. As indicated by the restatement of the question presented, *supra*, that was the only evidence relevant to the present matter, because the sole defensive issue raised and determined by the trial court in Montgomery County, Maryland, was whether petitioner was in fact a domiciliary of Nevada when she obtained her divorce there. That issue — the only real issue presented by the record — has been virtually abandoned in the petition's effort to conjure up an issue sufficient for presentation to this Court on petition for a writ of certiorari.

The trial record presents massive and overwhelming evidence (1) that Nevada was merely a way station utilized by petitioner en route to a second attempted marriage (Appendix A, *infra*;

(2) of a chronology of events conclusively showing that Las Vegas, Nevada, was not petitioner's home, but merely a way station to that second marriage (Appendix B, *infra*); (3) of the many things petitioner said and did from the time she left for Las Vegas conclusively showing that she did not intend to make it her home (Appendix C, *infra*); (4) reflecting on petitioner's many interests and attachments in Montgomery County, Maryland, and the greater Washington area, as compared to her minimal interests in the Nevada community which established that she never intended to give up her old home or acquire a new one in Nevada (Appendix D, *infra*); and (5) that petitioner's purported attachments to Nevada were utterly illusory (Appendix E, *infra*).

ARGUMENT

In the light of the opinions of the Maryland Court of Appeals (R. 183-199) and of the trial court (R. 16-20), and the overwhelming mass of testimony that petitioner was not a domiciliary of Nevada when she applied for and obtained her ex parte divorce, the only issue in this case was and is the *factual* one as to where petitioner's domicile really was. Any other purported questions involved are merely conjured up in a last ditch effort to upset the final judgment of the Court of Appeals of Maryland. In that context, this case presents no question appropriate for consideration on certiorari, because this Court will not grant the writ to review judgments based solely on questions of fact. *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U. S. 206 (1940); *United States* v. *Johnston*, 268 U. S. 220

(1925); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938). Nor will the certiorari power be exercised unless the case truly presents questions of gravity and importance, or in order to secure uniformity of decision. *Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923); *Lair Oil Bow* v. *United States*, 144 U. S. 47 (1892); *American Construction Co.* v. *Jacksonville T. & K. W. R. Co.*, 148 U. S. 372 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251 (1916).

The opinions below enunciate no new principle of law. Acting within an established line of authority applying the requirements of full faith and credit to the consideration of a foreign divorce by the state of domiciliary origin, the Maryland court clearly had jurisdiction to consider the issue of fact, properly presented, whether petitioner had lost her Maryland domicile and acquired a new Nevada domicile when she applied for her Nevada divorce. Since the Maryland court so acted within established law and acted only with respect to an issue of fact, its judgment is not open to re-examination here—apart from the necessary conclusion to be drawn from the record that its determination of fact was entirely correct.

So understood, it is clear that there is no basis whatsoever for the petition. More particularly, taking the arguments of the petition seriatim:

1. There is no quarrel with the assertions that full faith and credit is to be given the judgment of a sister state, provided the sister state had proper jurisdiction and that, in attacking such jurisdiction, the burden rests heavily upon the assailant (Pet. 9-10).

As shown by the record and the opinions below, respondent demonstrated the absence of such jurisdiction by overwhelming evidence.

2. There is no quarrel with the assertion that the Nevada decree was not open to collateral attack *if* petitioner was a bona fide resident of Nevada when she obtained her divorce (Pet. 10-11). The whole question below revolved around the "if" and the record overwhelmingly established that petitioner was not a bona fide resident of Nevada when she obtained her divorce.

3. There is no quarrel with the naked assertion that petitioner had the right to go to Nevada to obtain a divorce, except insofar as it is attempted to be applied to the instant case, where that was her sole motivation and delimited the intended period of sojourn in Nevada. *Epstein* v. *Epstein*, 193 Md. 164, 66 A. 2d 381 (1948), adverted to by petitioner (Pet. 11), holds no more than that the mere fact that a marriage partner goes to another state to obtain a divorce is not subject to challenge if—and that is the big "if" in this case—in doing so he or she truly intends to make the proposed divorcing state his or her domicile or home. In the second *Williams* case, *Williams* v. *North Carolina*, 325 U. S. 226, 236 (1945), this Court found no error in an instruction to the jury trying the spouse who had obtained the ex parte divorce on a charge of bigamy by reason of his remarriage thereafter, where the charge stated that:

> "If the jury found . . . that petitioners had domicils in North Carolina and went to Nevada 'simply and solely for the purpose of obtaining' divorces, intending to return to North Carolina on obtaining them, they never lost their North

Carolina domicils nor acquired new domicils in Nevada."

Thus, an ex parte decree could not be challenged if petitioner had intended to make Nevada her true home, even though she may have gone there to make it her home because she wanted also to obtain a divorce. But if divorce was her sole reason for going to Nevada, and if she had no intention of making it her home—which, on substantial evidence, was found to be the fact below—then the Nevada decree obviously could be impeached in Maryland as it was.

Petitioner's claim that she had abandoned her Maryland domicile and never returned to that state, and hence that she acquired a legal domicile in Nevada (Pet. 11-15) is predicated on a myopic view of the limited agreed statement of undisputed facts taken together with certain minor additions adverted to in the petition's statement of facts. This claim wholly ignores the mass of evidence—most of it from petitioner's own mouth—upon which the Maryland Court properly and necessarily concluded as a fact that she was not a true domiciliary of Nevada. The implication in the petition that to conclude otherwise than as it asserts would leave a vacuum between March 4, 1955, and February 21, 1956 when petitioner was without a domicile (Pet. 14) is sheer legerdemain (1) in view of the clear fact, established by the record that petitioner never intended to give up her Maryland domicile when she left for Nevada on March 4, and (2) in view of the clear law that an existing domicile is not lost until a new one is acquired: (*Williams* v. *North Carolina*, *supra*; *Streitwolf* v. *Streitwolf*, 181 U. S. 179 (1901)).

and that the acquisition of a new domicile ". . . implies a nexus between a person and place of such permanence as to control the creaton of legal relations and responsibility of the utmost significance." *Williams* v. *North Carolina*, *supra*, 325 U. S. at 229. See also, *A. L. R. Conflict of Laws*, §§ 18 and 19.

4. The alleged fallacy in the opinions below, i.e., that the courts considered residence in Washington, D. C. or the greater Washington metropolitan area as equivalent to residence in Montgomery County, Maryland (Pet. 15-16), is merely a straw man erected to support an issue for attempted consideration here. In context, the purpose of such references was only to show that petitioner had never intended to abandon her Maryland domicile, or that she had never intended to make Nevada her home, and, therefore, could not have acquired domicile there.

To challenge the jurisdiction of the Nevada court, and establish respondent's right to relief in Maryland, it was only necessary for respondent to show —as he unequivocally did — that petitioner never intended to establish a home, in Nevada. Having thus proven that petitioner was not a domiciliary of Nevada; it became wholly irrelevant whether she intended to return to Montgomery County, Maryland, or to some other portion of the greater Washington metropolitan area, or intended to go to Timbuktu, because any existing domicile which petitioner had would continue until such time as she acquired a new one.

5. Certainly the assertion that whether petitioner was a bona fide domiciliary of Nevada was one for the Nevada court (Pet. 16) is belied by the many

decisions of this Court beginning with and stemming from the *Williams* cases holding, *inter alia*, that the issue of domicile in the context in question is not a matter of local law for the divorcing state alone, but concerns an historic notion common to all English-speaking courts, so that such a factual determination is always open to re-examination, particularly by the state of domiciliary origin which has an unquestioned interest and authority in the matter.

6. Finally, for the reasons expressed in the opinion of the Court of Appeals of Maryland, petitioner's contention that respondent is foreclosed from collaterally attacking the decree of the Nevada court (Pet. 19, *et seq.*), while novel, is utterly specious. It may be true that this Court has never decided the specific question whether facts such as relied upon by petitioner would estop or foreclose a husband from challenging the jurisdiction of a Nevada court to have granted his wife a divorce. However, clear expressions have time and again demonstrated that the power of the courts of the state of domiciliary origin to examine into the question of jurisdiction of the divorcing state are limited *only* where the challenging spouse had submitted to that jurisdiction or had been subjected to it by appropriate service of process within the jurisdiction of the divorcing court. To suggest otherwise would create anarchy, because, in every case where ex parte divorces or judgments of any kind were obtained, imposition and hardship would be worked upon the absentee parties who, to later resist or avoid subjection to the judgment so obtained, would have to show their economic or other inability to have traveled to or stayed within the jurisdiction of the court rendering the judgment in

order not to be bound by its effects. A court in which the question of jurisdiction was later raised would have to go into endless inquiries as to whether the absentee could or should have submitted himself to the jurisdiction in question. Certainly such notions are alien to historic common law concepts of jurisdiction.[1]

CONCLUSION

The record and opinions below conclusively establish that the only real issue in this case was the single question of fact whether petitioner had become a domiciliary of Nevada when she sought her ex parte divorce there, that the case thus understood does not present any issue of certiorari stature, and that the judgment of the Court of Appeals of Maryland was entirely correct and beyond challenge. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] Quare whether public policy indicates such an elastic concept of jurisdiction to support ex parte divorces obtained by the absentee on the basis that the mate is to be estopped to challenge jurisdiction because he or she took steps to persuade the absentee to return home.

APPENDIX A

1. Beginning, at least in 1954 or 1955, and continuing up to the date of their purported marriage, Sarah Colby was having substantial, intimate correspondence with Scott Appleby (R. 97, 99, 114; Pl. Exs. 23, 24, 25, 26, 27, 29, 30, 31, 32, 33 and 34).

2. Sarah Colby discussed going to Nevada with Washington, D. C. attorney Norman Frost, who was Appleby's attorney (R. 107).

3. Addressing her as "My Precious," Appleby wrote to Sarah Colby, stating in part (Pl. Ex. 33, R. 154-155):

> "It was good talking to you last evening and to know that you too were working and right on the ball. I admit I am aching to get hold of F and get him in behind the Rockville gang but I will be patient and hope you find them there and in order—
>
> "I believe you should write F. a letter and tell him since you have been unable to get a property settlement that you are returning here as soon as your decree is granted and you will want him to negotiate a property settlement—Ask him everything you want to know—about going back to Cedar Pkwy changing locks etc etc — F is interested and glad to render service—I made it clear to him that I felt responsible for getting you into your present situation and I intended to see you through it. He is being paid so lets have him earn his fee—
>
> "Besides I have made him lots of money and he needs me much more than you need him. Write him freely or phone him and ask any question you have on your mind—and too ask him to do anything you want done—
>
> "Personally I have the feling [sic] that B has vacated or will vacate Cedar Pkwy before you return and that you can go there, change your locks (a one day job) change your 'phone and be independent, how-

ever if you feel you do want to wash your hands and wind up all of that location I am with you 100% and please know that there are no obstacles that we cannot overcome."

4. Immediately upon her arrival in Las Vegas, Mrs. Colby consulted an attorney, with whom arrangements had been previously made by Appleby's Washington lawyer (R. 54, etc.).

5. Sarah Colby made plans to return to the Washington area immediately after obtaining the divorce; she made reservations at the Fairfax Hotel in Washington for the first week of June of 1955 (R. 49).

6. On July 27, 1955 from Glencoe, Illinois, Sarah Colby wrote Ben Colby stating (Pl. Ex. 18, R. 141):

> "I will be coming to Washington sometime soon to attend to some business. Have you had the house put completely in my name so that I can stay there?"

7. Sarah Colby wrote to her daughter's school stating that because of family difficulty, she had to take Rob "out of town with me for several weeks" (Pl. Ex. 3; R. 137) and that "if on her return we would find that she is at all behind her class perhaps we could have her tutored" (Pl. Ex. 4, R. 137).

8. From Las Vegas, Sarah Colby wrote to her maid, Estelle White (Pl. Ex. 7, R. 138), "We hope it will not be too long before we see you."

9. Indicative of her intent not to remain in Nevada any longer than necessary to obtain a divorce is her letter to her husband stating (Pl. Ex. 8, R. 138):

> "Dear Ben—I feel very bitter about the dragging out of this divorce—8 more weeks. It is so needless and futile and works a great hardship on Rob and me."

10. Indicating that her sojourn in Nevada was only temporary, on May 12, 1955, Sarah Colby wrote to her daughter's teacher in Washington (Pl. Ex. 9, R. 138):

> "We had expected that Rob would be back in Washington long before this. However, we have been delayed and it now appears that she will not be back until the first or second of June.
>
> "I have waited this long to write you because I was still unsure of our return date—and I certainly hope that it has not caused you any inconvenience.
>
> ". . . On my return I hope I may talk with you about having Rob tutored to make up what she has missed."

11. On May 7, 1955, Sarah Colby wrote to her son that the divorce papers had been served on her husband "Wednesday—so that cuts down our time out here by 2 weeks" and that "We expect to be back in D.C. about May 30th" (Pl. Ex. 11, R. 139).

12. Again reflecting her desire to leave Nevada as soon as possible, Sarah Colby wrote her husband (Pl. Ex. 14, R. 139-140):

> "Why don't you come out here some time in the next 2 or 3 weeks and let us talk over things and try to arrive at some sort of an agreement. We are not getting anywhere this way and it is just costing me a lot more money.
>
> "You said this climate made you feel good anyway. My publication ended the 31st and I just have 3 more weeks—so you'd have to be here before the 21st. I can get the divorce then regardless of anything."

13. In a letter to her son, Mrs. Colby expressed her intention to return to her Maryland home, stating (Pl. Ex. 15, R. 140):

> "I just don't know about 5815 Cedar Pkwy. The lawyer says the court will award it to me—but I'm not

going to get a court order and put Ben out—so I'll just rent another. I've written asking him for it. But only get letters still arguing about who's wrong and who's right which of course makes no difference—anyone is always some of both."

14. In a letter from Scott Appleby to Sarah Colby, addressing her as "My Own Precious Girl," Appleby quotes romantic poetry and states: "I only hope the course you serve is worthy of the sacrifice we make." The letter closes with his protestation of love: "I am writing too much I fear—only try to tell you— I love you—Your devoted" (Pl. Ex. 23, R. 142-143).

15. In another letter, Appleby declares his love for "My Darling" stating (Pl. Ex. 24, R. 143-144):

> "I hope you are making the very most of each passing day—if my love can add to your happiness you may be supremely happy—you have all of the love of which I am capable—Your devoted."

16. In a "Happy Birthday" letter, dated August 28, 1954, Appleby leaves no doubt as to their relationship, stating (Pl. Ex. 25, R. 144-145).

> "Happy birthday to the sweetest, dearest, most wonderful girl in all the world. The girl who means so much to so many and who is so deserving of all of the best that life has to give."

17. In another letter, looking to their early reunion, Appleby wrote (Pl. Ex. 26, R. 145-146):

> "It seems a terribly long time since that July 13th evening—now a month away—yet in another way the days are moving swiftly—When you receive this there will be only two weeks until Sept. 1st and the anticipated joys of real happiness which will be mine thereafter will give us patience to endure them—"

18. Reaffirming his interest in the divorce litigation as the stepping stone to their reunion, Appleby wrote Mrs. Colby (Pl. Ex. 27, R. 146-147):

> "I feel sure that B. could never ask for a Jury trial because if he does he puts himself entirely in the hands of that court as to property settlement etc. And you will ask for plenty. There is no way of knowing, just wait and see, next whatever it is—this long fast between us is over—you and I are going to see plenty of each other after Apr. 20th. I have nothing to do except go where I want to go and I will want to be where you are.
>
> "... Just know I love you and am fighting with you every step of the way—All of my love X"

19. Sarah Colby made reservations in Las Vegas for one twin room in the name of Mr. and Mrs. Scott Appleby of 2530-? th Street, N. W., Washington, D. C. at the Riviera, Las Vegas, Nevada (Pl. Exs. 28A and 28B, R. 147-148).

20. In a letter, again saluting, "My Precious," Appleby confirms his role as mastermind of the divorce litigation. He states that he has talked with Mr. Frost, his attorney, about the prospects of going to Las Vegas and describes his plan of having Sarah Colby meet him in Los Angeles (Pl. Ex. 29, R. 148-149):

> "I have just talked to F and he advises against my going to L.V. He says OK if I could do so without anyone knowing it, but on account of the party we are dealing with, he would twist things around to suit his own ends. Of course no one there knows me and if I used an assumed name it might work. For reasons of F's it might be—for you not to stop at the—but elsewhere, but you know—would not mention to F an—about your coming to L.A.. Could we have any privacy at Chapman Park? The Biltmore is pretty bad in that respect. I don't want any visit that is punishment.
>
> "... I never dreamed that F would be so ultra conservative about my going to LV but he doesn't want

us to give him one thing to hit back with. We have been good soldiers for five months and as hard as it is we can stand it a few more weeks. Again I must leave all of this decision to you. I am happy to—what ever you decide is best—"

21. Further confirming his position at the helm in the voyage to obtain a quick ex parte divorce for Mrs. Colby, Appleby wrote (Pl. Ex. 30, R. 149-152):

"... [The Las Vegas attorney is] an unsatisfactory Atty—I hope you don't pay him any money tell him F will pay him.

"The failure to run the ad is inexcusable—I will tell he had better get another correspondent for future cases and also I will tell him to pay J, as little as possible—

"F phoned me last night shortly after our phone talk—told me service was obtained—Wednesday night the 4th. I immediately had Dot wire you. In fact I wrote the telegram but felt I should not sent it—... F selected him because—F thought J had great influence with the courts. I am afraid it would not be wise to change Attys now, altho I wish you could so—... I don't intend for you to have much time to yourself after you get here, with me in town. I have hoped you could return to Cedar Pkwy—Don't hesitate to write F for advice and information as to what you should do on your return. I really think you should write him, telling him you will have no property settlement but ½ of Pkwy house is yours—Maybe Nickey could get him out of the house for you—... Darling mine, please know we are on the job at this end of the line—" See also P. Ex. 33, R. 154-155 re Appleby's role in arrangements for the divorce.

22. In another letter commencing with "My Precious" Appleby indicates that he knows of Sarah Colby's desire to return to Washington by Stating (Pl. Ex. 31, R. 152-153):

"... Please don't go to Cedar Pkwy unless you know he has moved out."

23. Later Applyby reports on the Service of process on Sarah Colby's husband in Washington (Pl. Ex. 32, R. 153-154):

> "... I am terribly anxious to get a report from you about the papers being served and as to the date set for your hearing—My understanding from F was that he was served at 5815 Wednesday evening May 4th. F. say he called the Sheriff's office on the eve of the 5th and was given that report—so your hearing should be set for the 25th or 26th. Please keep on the job as to that point—"

24. In a letter of May 19th Appleby again indicates his desire to resume the relationship with Sarah Colby after she returns from Las Vegas by stating (Pl. Ex. 34, R. 156-157):

> "... I agree with you 100% that you should not return to Cedar Pkwy until that property is settled. I phoned Dot last evening to get space for you at the Fairfax for June 2nd ... Gee it will be just 'out of this world' to have you free and to have your companionship *again*—All of my love Precious" (Emphasis added).

Appleby also mentions that if Sarah Colby has any questions she should call his attorney, Frost (Pl. Ex. 34, R. 156-157):

> "Please don't hesitate to call F nights or Sundays—any time you are able to catch him—Make him get on the ball and too—ask him for suggestions and advice.
>
> "Darling—you were wonderful to phone me—now I feel sure the papers will be there on time I feel like a new person—Gee it will be wonderful beyond words to have you again—All of my love—Precious."

APPENDIX B

1. March 4, 1955—Mrs. Colby left Washington for Chicago (R. 35).

2. March 6, 1955—Mrs. Colby left Chicago for Las Vegas (R. 35).

3. March 7, 1955—Mrs. Colby arrived in Las Vegas (R. 30).

4. March 8, 1955—Mrs. Colby consulted with Las Vegas lawyer and by prearrangement of her Washington counsel (R. 32).

5. Some time in March or in the early part of April, Mrs. Colby made return reservation for April 25, 1955 (R. 41).

6. April 19, 1955—Mrs. Colby filed divorce suit in Nevada, exactly six weeks after her arrival (R. 43).

7. Some time in May of 1955 after hearing that Mr. Colby had been served on May 4th, she made the reservation at the Fairfax Hotel in Washington for the first week in June (R. 49).

8. June 9, 1955—Mr. Colby served in Washington with Nevada process. (R. 22).

9. June 30, 1955—Nevada decree of divorce granted, exactly twenty-one days after service of process (Mr. Colby had twenty days in which to answer) (R. 53).

10. July 12, 1955—Mrs. Colby left Las Vegas for Chicago after renting a room in Las Vegas which she never occupied (R. 54).

11. August 8 or 10, 1955—Mrs. Colby returned to Washington. (R. 61).

12. August 18, 1955—Mrs. Colby rented a house on Utah Avenue, N. W., Washington, D. C., (R. 62).

13. September 21, 1955—Mrs. Colby served with process in the instant suit (R. 78).

14. October 9, 1955—Mrs. Colby left for Las Vegas and rented another apartment there. However, she still kept the Utah Avenue house in Washington (R. 56).

15. December 1, 1955—Mrs. Colby traveled from Las Vegas, Nevada to Chicago, Illinois (R. 56).

16. December 7, 1955—Mrs. Colby arrived in the District of Columbia (R. 71).

17. January 6, 1956—Mrs. Colby left the District of Columbia for Chicago, Illinois (R. 71).

18. January 17, 1956—Mrs. Colby arrived in Las Vegas, Nevada (R. 71).

19. February 21, 1956—Mrs. Colby went through a purported marriage with Scott Appleby (R. 173).

APPENDIX C

1. During the latter part of 1952 or the early part of 1953, she consulted Mr. Godfrey Munter, a District of Columbia attorney, and for the first time conceived the idea of going to Nevada for a divorce (R. 32).

2. She knew she could get a divorce much sooner in Nevada than in Maryland (R. 31).

3. Prior to going to Las Vegas to obtain a divorce in March of 1955, she had only gone through there once on a train and had never gotten off the train. Before going to Las Vegas, she didn't know anything about the city, except that she could get a divorce there without having to wait. She stated that one of the advantages of living in Las Vegas is that the climate is wonderful. But when questioned why she didn't remain in Nevada during the

summer of 1955, she replied, "Have you ever been in Las Vegas in July and August? It is 110 degrees" (R. 33).

4. Her maid, Estelle White, testified that to her question, "When are you going to come back home?", Mrs. Colby replied, I will come back to live here but I won't live with Mr. Colby again" (R. 26).

5. With a check dated February 24, 1955, she bought Maryland license tags for her automobile (R. 35, 135).

6. Although her daughter was fond of their pet dog and they intended to keep the pet, they made no arrangements for the dog before going to Las Vegas, and in fact left it in Maryland (R. 37).

7. She did not resign from the Presidency of the Chevy Chase Garden Club, gave them no change of address, and well knew that the Garden Club had no members outside of the Washington area (R. 60).

8. At no time before March 4, 1955, or after January 6, 1956, did she give an address where her mail could be forwarded to her in Las Vegas (R. 86).

9. Prior to going to Nevada, or while in Nevada, there was no change of address for any of the many corporate dividend checks that she was receiving (R. 53).

10. She never resigned from the Women's Board of Trustees of the House of Mercy, a Washington, D. C. organization (R. 63).

11. The day after arriving in Las Vegas, she consulted an attorney; arrangements had been made previous to her arrival for her to consult this attorney about obtaining a divorce (R. 54).

12. She rented an automobile in Las Vegas, and gave her home address as Chevy Chase, Maryland (R. 47).

13. She engaged in no club activities of any kind in Nevada (R. 55).

14. In correspondence to the officials of her daughter's school in Washington, she indicated that her daughter

would return to the school in Washington in the near future (Pl. Ex. 3, R. 137, and Pl. Ex. 4, R. 137, R. 43-44).

15. On May 7, 1955, she wrote to her son, Tuck, at Harvard, and stated, "Second—is that the papers were served on Ben Wednesday . . . so that cuts down our time out here by two weeks" (R. 139).

16. A letter written by Sarah Colby to a friend in March of 1955 stated, "We cannot file suit until after the 44th day of residence and then if Ben doesn't contest out here it will take weeks longer. He just wrote me that he would not put himself under the jurisdiction of the Nevada courts, that instead, he would wait until I return, have the divorce set aside, or legally declared illegal, so I have to be especially careful about my residence here. Also, I can't write him and bargain because I can't even suggest I would be returning to Washington or that this wasn't my permanent residence" (R. 42).

17. Mrs. Colby made reservations at the Fairfax Hotel in Washington for the first week of June, 1955 (R. 49).

18. About June of 1955, she rented a room in Las Vegas, paying $150, in order to leave her clothes there, but never spent even one night to sleep in that room (R. 73). In fact, two-thirds of time after Sarah Colby came to Nevada was spent away from Nevada (R. 70).

19. In a letter written to her son, Tuck, at Harvard in July, 1955, while she was staying in her mother's home in Glencoe, Illinois, she wrote, "Since I had to get my divorce by default . . . Ben has six months in which to appeal it . . . if he can find any grounds in which he can do that. Therefore, I cannot return to Washington and set up a home until after January 1, and I have to keep a room rented in Las Vegas for my permanent residence until then also. That means I have to send Rob to boarding school as I can stay in D. C. only three or four weeks at a time" (R. 64).

20. On July 27, 1955, from Glencoe, Illinois, she wrote to Ben Colby and stated, "I will be coming to Washington sometime soon to attend to some business. Have you had the house put completely in my name so I can stay there" (R. 141).

21. During the summer of 1955, Sarah Colby wrote to the Social Register, giving her permanent address as Chevy Chase, Maryland (R. 59).

22. While in Las Vegas, Mrs. Colby did not gamble or engage in the other usual activities there (R. 33).

23. While in the District of Columbia, after returning from Las Vegas, she continued to use her Garfinckel's charge account with a Chevy Chase address (R. 75-76).

APPENDIX D

Chevy Chase, Maryland and East	Las Vegas, Nevada
Spacious private home in Maryland	Meager apartment in Nevada (R. 38)—never made an offer to buy a home in Nevada (R. 95)
Philanthropic Interests: Garden Club of Chevy Chase (R. 90, 29) House of Mercy (R. 29) Board of Directors YWCA (R. 30) Planned Parenthood (R. 29) National Society of Colonial Dames of America (R. 92) Social Register of Washington (R. 59) Many relatives and friends in Maryland	No philanthropic interests in Nevada (R. 55) No relatives or close friends West of the Mississippi (R. 46)
Children's Schools: Harvard (R. 46) Princeton (R. 46) Holton Arms, Washington, D.C. (R. 34)	

APPENDIX D—Continued

CHEVY CHASE, MARYLAND AND EAST	LAS VEGAS, NEVADA
Automobile registered in Maryland, February 24, 1955, the same day reservations were made for her to go to Nevada (R. 35, 135)	Automobile rented in Las Vegas, but Maryland address given (R. 39)
All of Mrs. Colby's belongings left in Chevy Chase home with sole exception of two suitcases (R. 36)	Only belongings in Nevada were in two suitcases (R. 57)
Physical Presence: Two thirds of time spent outside of Nevada (R. 70)	One-third of time after Sarah Colby originally came to Nevada was spent outside of State (R. 70)
Mail: Never changed permanent mailing address to Las Vegas (R. 37)	Some personal mail forwarded to her mother's home in Illinois (R. 37)
Bank accounts in Maryland and District of Columbia retained (R. 87)	Only one bank account opened—The First National Bank of Nevada in Las Vegas (R. 87)
Corporation Dividend Checks: No change in address from Chevy Chase, Maryland, to Las Vegas, Nevada (R. 53)	
Charge Accounts: Retained her charge accounts in Washington, D.C. department stores (R. 75-76)	No known charge accounts in Nevada
Alleged need for new climate: No evidence of any medical need for a change of climate (R. 38)	
Attorneys: For various matters, continued to use Washington attorneys (R. 107)	Attorney in Nevada obtained through Appleby's attorney, Frost, in Washington for purposes of divorce only (R. 107, 39)

APPENDIX E

ALLEGED NEVADA ATTACHMENT	THE FACTS
Nevada auto registration and license	Applications made and automobile purchased *after* Mrs. Colby had obtained the Nevada divorce (R. 91)
Nevada voting registration	Obtained in October, 1955 (Mrs. Colby refused to answer whether this was done after consulting her attorney (R. 94)
Apartment and room in Las Vegas	Never used her Nevada room at all; letter to her son practically admitted this was done as camouflage (R. 64, 73)
Employment in Nevada	Started October 1955; worked only a short time—one day—not needed for financial purposes (R. 79)
Social security card	Only obtained social security card after served with process in the Maryland case (R. 9)
Accepted $2,000 from her aunt to use as down payment for house in Nevada	Never made an offer to buy a home in Nevada (R. 95)